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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 765

GEORGE SCHAEFFER, JR., AND ELSIE SCHAEFFER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 6–17) is reported at 319 F. 2d 907. The district court did not write an opinion.

JURISDICTION

The judgment of the court of appeals was entered on July 17, 1963. A petition for rehearing was denied on October 17, 1963. The petition for a writ of certiorari was filed on January 15, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

An Act of Congress authorized the construction of a diking project and provided that no expenditures should be made until all landowners whose lands might be benefited had entered into agreements to reimburse the government for the cost of construction. The United States constructed the project after obtaining repayment contracts from most, but not all, of the owners benefited. The question presented is whether the contracting landowners were relieved of their reimbursement obligations by virtue of the government's failure to obtain contracts from all the owners, even though that failure in no way increased the amount of their respective liabilities.

STATUTE INVOLVED

The Act of March 18, 1926, 44 Stat. 211–212, provides:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That there is hereby authorized to be appropriated the sum of $65,000, or so much thereof as may be required, for reclaiming by construction of dikes approximately four thousand acres of lands in Indian and private ownership within and immediately adjacent to the Lummi Indian Reservation, in the State of Washington: *Provided,* That the total cost of the project shall be distributed equitably among the lands in Indian ownership and the lands in private ownership that may be benefited in accordance with the benefits received as designated by the Secretary of the Interior.

SEC. 2. The construction charge properly assessable against the Indian lands shall be reimbursed to the Treasury of the United States under such rules and regulations as the Secretary of the Interior may prescribe, and there is hereby created a lien against all such lands, which lien shall be recited in any patent issued therefor, prior to the reimbursement of the total amount chargeable against such lands.

SEC. 3. No part of the sum provided for herein shall be expended for construction on account of any lands in private ownership until an appropriate repayment contract in accordance with the terms of this Act and in form approved by the Secretary of the Interior shall have been properly executed by the landowners whose lands may be benefited by the project.

SEC. 4. The Secretary of the Interior is hereby authorized and directed to declare by public notice the cost of the project and the equitable share to be assessed against the lands benefited in accordance with their respective benefits, which cost shall be repaid in annual installments, the first installment to be 5 per centum of the total charge and be due and payable on the 1st day of December of the third year following the date of such public notice, the remainder of the said cost with interest on deferred amounts against land in private ownership from the date of said public notice to be 4 per centum per annum, to be payable on each December 1 thereafter, on the same basis as the first installment, until the obligation is paid in full.

SEC. 5. The Secretary of the Interior is hereby authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this Act into full force and effect.

STATEMENT

This action was instituted (a) to recover amounts due from petitioners as their share of construction, operation and maintenance costs, (b) to enforce covenants running with the land, and (c) to foreclose liens arising under repayment contracts executed by the petitioners or their predecessors in title (Pet. App. A1–A5), in connection with the Lummi Diking Project constructed by the United States pursuant to the Act of March 18, 1926, 44 Stat. 211, *supra* p. 2.

The project involved the construction of dikes to protect lands within the Lummi Indian Reservation, as well as privately owned lands adjoining the reservation on the east, from the overflow of fresh water from the Nooksack River, the eastern boundary of the project lands, and from salt water tides of the Lummi River on the southwest side of the reservation.

Petitioners or their predecessors in title were the owners of all project lands east of the reservation, except for one tract. In 1926, 1927, and 1928, they entered into repayment contracts and supplemental agreements under which they assumed the cost which should have been paid by the one landowner outside of

the reservation who did not sign a contract. The contracts contained the following provision:

> Now, therefore, and in order to aid in the accomplishment of the purposes of the Act, the said undersigned owner of the lands aforesaid covenants, promises, and agrees to and with the Secretary of the Interior and with all other landowners whose lands may be included within the project, in consideration of the premises, the promises of said other landowners, and the work to be done by the United States in connection with the project, that if the Secretary of the Interior shall construct dikes for the purpose contemplated in the Act, said lands shall at once be and become burdened with and subject to a first lien, so far as this agreement can make the same a first lien, to secure to the United States the full payment of a pro rata share of the entire cost of said project and all of the betterment, operation, and maintenance charges, and penalties in connection therewith; * * *.

Prior to the execution of the agreements, the Secretary of the Interior notified the petitioners (or their predecessors in title) that he had identified and determined the area of the lands to be benefited by the dikes, and allocated the construction charges in accordance with the relative benefits. While the private owners of seven tracts inside the reservation did not execute repayment contracts, that circumstance did

not affect the allocation of the construction costs among the other landowners (R. 23–30).[1]

On August 19, 1930, the Secretary of the Interior issued a public notice fixing the construction cost assessed against each acre in the project, and the terms of payment (25 C.F.R. (1949 ed.) § 144; (R. 26)). At all times since the completion of the work, the costs of operation and maintenance have been assessed against owners of all lands within the project on an equitable pro rata basis, and the government has claimed valid liens upon the privately owned lands. Statements for the charges have been rendered from time to time, and payments have been demanded from petitioners or their predecessors. Although making some payments, they have refused or neglected to make others (R. 26–30). Hence, this proceeding was instituted.

The district court entered a summary judgment for petitioners, based upon stipulated facts, holding that the contracts required the government to obtain agreements from all of the landowners as a condition precedent to the liability of the contracting parties. The court of appeals reversed the judgment and remanded the cause.

ARGUMENT

1. Section 3 of the Act of March 18, 1926, authorizing the Lummi Diking Project provides that no part

[1] The Department of the Interior originally took the position that even in the absence of contracts, these seven tracts within the reservation were subject to the statutory lien. The United States district court agreed with the Secretary's view, but in 1958 the court of appeals reversed. *Hood* v. *United States*, 256 F. 2d 522 (C.A. 9).

of the appropriated funds shall be expended for construction "until an appropriate repayment contract * * * shall have been properly executed by the landowners whose lands may be benefited by the project." The Secretary of the Interior entered into appropriate repayment contracts with petitioners (or their predecessors in title), whose lands lie immediately outside the Lummi Reservation. Despite the statutory directive, however, the Secretary proceeded to construct the project works without obtaining repayment agreements from seven private landowners within the reservation. In *Hood v. United States*, 256 F. 2d 522, the Ninth Circuit held that the Secretary could not recover any part of the construction costs from the noncontracting landowners. But there was no increase in the amounts assessed pro rata to the contracting landowners; the burden of the Secretary's error fell entirely upon the Treasury, not upon petitioners. Nonetheless, petitioners urge that the Secretary's *ultra vires* action relieved them of their contractual obligation to repay their fair share of the project costs. That contention is wholly without substance.

The manifest purpose of Section 3 was to assure that the costs of the reclamation project would be borne by the persons (such as petitioners) whose lands were benefited, rather than by the general taxpaying public. Yet the petitioners, relying upon that very provision, argue for a result which would give them an enormous windfall, saddle the taxpayers with the entire cost of the project, and thus totally defeat the

plain purpose of the statute.[2] Indeed, since the construction of the dam in no way prejudiced petitioners, but on the contrary greatly enhanced the value of their property, they are plainly without standing to challenge the Secretary's action. *Massachusetts* v. *Mellon*, 262 U.S. 447. Cf. *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113. And, in any case, that action was ratified by Congress when it subsequently made several appropriations—aggregating approximately $50,000—for further construction work and for the repairing of flood damage to the project. Act of Feb-

[2] Petitioners argue that, whatever may be true of the construction costs, the pro rata share of future operation and maintenance expenses will inevitably increase, since there is no assurance that Congress will appropriate funds to defray the charges attributable to the non-contracting lands. This fear is both groundless and irrelevant. In the first place, the issue in this case is petitioners' liability, not for *future* costs, but for charges which have already accrued in the past, and which were allocated in a manner which assumed that the non-signing landowners would pay their share. Second, the district court's summary judgment held that the government had no valid lien whatever either for construction charges or for operation and maintenance charges. In setting aside this judgment, the court of appeals, explicitly stated (Pet. A 16) that questions as to the proper *amount* of the operation and maintenance charges would still be open upon remand, and that "[w]e do not presume to pass upon these questions at this time, except to make it clear that operation and maintenance expense chargeable to appellees may not be increased by reason of the failure of appellant to obtain repayment contracts from the nonsigning owners." It is evident, therefore, that petitioners are already well protected by the court of appeals decision against any future increase in their assessments.

ruary 14, 1931, 46 Stat. 1115, 1129; Acts of February 17, 1933, and March 4, 1933, 47 Stat. 820, 832, 1602, 1608; and Act of June 22, 1936, 49 Stat. 1757, 1772. These appropriation measures, each of which specified that the money was "reimbursible" as provided by the 1926 Act, excused any impropriety the Secretary may originally have committed in proceeding without repayment contracts with all affected landowners.

2. Apart from the statute, petitioners also rely (Pet. 3) upon the provision of the repayment contract which states that the landowner's undertaking is "in consideration of the premises, *the promises of said other landowners,* and the work to be done by the United States in connection with the project * * *" (emphasis added; Pet. A 13). That reliance is misplaced. As the court of appeals pointed out, "the promises of said other landowners" was not a condition precedent to petitioners' liability. While the Secretary's failure to obtain those promises was admittedly a partial failure of consideration, it did not go to the heart of the contract and did not relieve petitioners of their own duty to perform. If petitioners can demonstrate that they were damaged as a result of that insubstantial breach—and we submit that they cannot—the amount of the damages may be set off against the charges which petitioners owe to the government.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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FEBRUARY 1964.

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